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ATTORNEYS FOR
Debtor and Plaintiff

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
(San Jose Division)

In re:

CORTE DE ROSA HOMES, LLC,

Debtor.

CORTE DE ROSA HOMES, LLC,

Plaintiff.

v.

VINEYARD BANK, N.A. and
CALIFORNIA BANK & TRUST.

Defendants.

Case No. 11-53334

CHAPTER 11

Adversary Proceeding

No. 11-05206

**OPPOSITION TO MOTION
TO DISMISS COMPLAINT**

**Date: September 8, 2011
Time: 9:30 a.m.
Dept. 3099**

Plaintiff CORTE DE ROSA HOMES, LLC (“Corte” or “Plaintiff”), hereby submits
the following response and opposition to California Bank & Trust’s (“CBT”) motion to
dismiss complaint (“Motion”):

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1 **I. The Motion Is Moot As Plaintiff Elected To Exercise Its Absolute Right To Amend**
2 **The Complaint And Filed An Amended Complaint.**

3 As a matter of law a party is entitled to amended his or her pleadings once as a matter
4 of course at any time before a responsive pleading is served (Federal Rules of Civil
5 Procedure, Rule 15(a) (hereinafter FRCP)). A motion to dismiss is not a responsive pleading
6 under the federal rule governing amendment of pleading (Doe v. United States (9th Cir. 1995)
7 58 F.3d 494, 497; see FRCP 15 (a)). Thus, if a defendant asserts the defense of failure to
8 state a claim in a motion to dismiss rather than an answer, the plaintiff has an absolute right
9 to file an amended complaint without leave of court (FRCP 15 (a); Shaver v. Operating
10 Engineer's Local 428 Pension Trust Fund (9th Cir. 2003) 332 F.3d 1198, 1201)

11 On September 6, 2011, Plaintiff filed a First Amended Complaint (Docket No. 11).

12 Accordingly, the Motion is moot and must be denied.

13 **II. Conclusion.**

14 The Motion is moot and must be denied because Plaintiff exercised its right to file an
15 amended complaint.

16 Dated: September 7, 2011

CAMPEAU GOODSSELL SMITH
/s/ William J. Healy
By: William J. Healy
Attorney For Plaintiff